85-736

No. .....

Supreme Court, U.S.
FILED
OCT 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

JOSEPH THOMAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

Whether the harmless error rule of *Chapman v. California*, 386 U.S. 318 (1967), should be applied to an alleged violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), in a case in which a criminal defendant presents a frivolous defense and where there is overwhelming evidence of the defendant's guilt?

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No. .....

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RALPH KEMP, WARDEN,

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v.

JOSEPH THOMAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfuily prays that the writ of certiorari issue to review the judgement and opinions of the United States Court of Appeals for the Eleventh Circuit entered in this action on July 8, 1985 and on September 12, 1985.

OPINIONS BELOW

The initial opinion of the United States District Court for the Middle District of Georgia denying Respondent federal habeas corpus relief was entered on July 17, 1981. (Appendix A). On appeal to the Eleventh Circuit, the Court reversed and remanded the case to the district court.

Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). Appendix B).

On remand, the district court entered an opinion dated September 14, 1984 denying federal habeas corpus relief on the issues before the Court on remand from the Eleventh Circuit (Appendix C). The Eleventh Circuit entered an order dated July 8, 1985 granting federal habeas corpus relief. *Thomas v. Kemp*, 766 F.2d 452 (11th Cir. 1985). (Appendix D).

Petitioner's petition for rehearing was denied on September 12, 1985. (Appendix E).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 8, 1985. A petition for rehearing was denied on September 12, 1985.

This petition for a writ of certiorari has been timely filed within the allowable ninety days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Section I, Fourteenth Amendment:

> Section I. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

—o—

STATEMENT OF THE CASE

Respondent, Joseph Thomas, was convicted for the April 12, 1976 murder of Clifford Floyd, along with co-defendant Ivon Ray Stanley. Respondent was also convicted of armed robbery and kidnapping with bodily injury and received sentences of death on all three convictions.

On direct appeal to the Supreme Court of Georgia, Respondent's convictions and sentences for murder and kidnapping were affirmed, but the death penalty which had been imposed based on the armed robbery conviction was vacated. *Thomas v. State,* 240 Ga. 393, 242, S.E.2d 1 (1977), *cert. denied,* 438 U.S. 908 (1978).

Respondent, represented by counsel, filed a state habeas corpus petition in the Superior Court of Butts County, Georgia. Following an evidentiary hearing, Respondent was denied relief and Respondent's application for a certificate of probable cause was denied by the Supreme Court of Georgia. This Court denied Respondent a writ of certiorari in *Thomas v. Zant,* 444 U.S. 1103 (1980). A second state habeas corpus petition filed by Respondent was denied without an evidentiary hearing.

Respondent then filed an application in the United States District Court for the Middle District of Georgia, Thomasville Division, pursuant to 28 U.S.C. § 2254 and on July 17, 1981, the District Court entered an opinion and order denying Respondent federal habeas corpus relief. Following briefing and oral argument, the Eleventh Circuit reversed and remanded the case to the District Court. *Thomas v. Zant*, 697 F.2d 977 (11th Cir. 1983).

On remand to the District Court, an evidentiary hearing was conducted and on September 14, 1984, the District Court entered an order finding that Respondent was barred from receiving an evidentiary hearing on Respondent's claim of ineffective assistance of counsel. On appeal to the Eleventh Circuit, the court entered an order dated July 8, 1985, finding that the trial court's instructions on intent violated the principles set forth in this Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). The Eleventh Circuit also found that the application of the harmless error rule was not appropriate under the circumstances of this case. *Thomas v. Kemp*, 766 F.2d 452 (11th Cir. 1985). Petitioner's petition for rehearing was denied on September 12, 1985.

Petitioner seeks review of the decision of the Eleventh Circuit in *Thomas v. Kemp*, 766 F.2d 452 (11th Cir. 1985), granting federal habeas corpus relief on the *Sandstrom* issue and he seeks review of the issue of the application of the harmless error rule to alleged *Sandstrom* violations.

———o———

REASONS FOR GRANTING THE WRIT

I. THE HARMLESS ERROR RULE OF CHAPMAN v. CALIFORNIA, 386 U.S. 18 (1967) IS PROPERLY APPLIED TO AN ALLEGED SANDSTROM VIOLATION, WHERE A CRIMINAL DEFENDANT PRESENTS A FRIVOLOUS DEFENSE AND THE STATE PRESENTS OVERWHELMING EVIDENCE OF THE DEFENDANT'S GUILT.

Although this Court expressly left open the question of whether a *Sandstrom* error can ever be harmless in the recent decision of the Court entered in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 1977 (1985), the plurality opinion of this Court in *Connecticut v. Johnson*, 460 U.S. 83 (1983) envisioned that the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967), might be applicable in certain specified circumstances. *Id.* at 87. Petitioner submits that where, as in this case, there is overwhelming evidence as to a defendant's guilt, the harmless error rule of *Chapman v. California, supra,* is properly applicable.

Petitioner submits that when there is overwhelming evidence of a criminal defendant's guilt, the possibility is removed that the jury reached its decision based solely on a mandatory or conclusive presumption, rather than on the nature of the evidence. As was observed in footnote thirteen of the plurality opinion in *Connecticut v. Johnson, supra,* "the pivotal concept of *Sandstrom* is that the *possibility* that the jury reached its decision in an impermissible manner requires reversal even though the jury may

also have reached the same result in a constitutionally acceptable fashion." *Connecticut v. Johnson, supra,* at 977, n. 13.

Petitioner submits that under the facts of this case, where the Respondent presented a frivolous defense and where the state's case overwhelmingly proves that Respondent murdered the victim, the harmless error rule should apply so as to prevent the granting of federal habeas corpus relief, pretermitting the question of whether the instructions to the jury are violative of *Sandstrom v. Montana,* 442 U.S. 510 (1979).

Petitioner submits that Respondent, Joseph Thomas presented a frivolous defense to the murder charge. Respondent claimed that he did not know whether or not he had harmed the victim, Clifford Floyd. (T. III, 75). Rather, Respondent stated that the only thing he could remember was that the day before the murder, he had gone to Albany, Georgia, where he had obtained some pills from a person there and had taken these pills. (T. III, 374-375). Respondent stated that he had no recollection of what he might have done after having taken these pills. *Id.*

The State's evidence revealed that Respondent and his co-defendant, Ivon Ray Stanley, had planned weeks prior to the murder of the victim, Clifford Floyd, an insurance man, to rob Mr. Floyd, as they needed money. (T. III, 164-167). The two men agreed that after the robbery they would "have to get rid of him because he will tell who we are." (T. III, 202).

On April 12, 1976, the victim was making his regular afternoon rounds near Bainbridge, Georgia, collecting weekly insurance premiums. When Mr. Floyd left the

Thomas household, Respondent contacted Stanley and under a pretext, they persuaded the victim to return to the Thomas residence. (T. II, 314). Upon his return, the victim was subdued and held at gunpoint by Stanley, who was armed with a pistol and Joseph Thomas, who was carrying a hammer and then the victim was taken into the woods. The victim and the Respondent exchanged words and Respondent became angry and struck Floyd on the forehead with a hammer. (T. II, 317). Respondent obtained a length of rope with which the victim was tied and then, leaving the victim and Stanley alone, Respondent walked back to where the victim had parked his car and drove the car away in order to hide it. (T. II, 322-325).

When Respondent returned to the place where the victim and Stanley were, the victim was tied to a tree and Respondent and Stanley agreed that they were "gonna have to get rid of him." (T. II, 327). Respondent went back to his house, got his mother's shovel and returned to the site. Respondent dug a shallow grave approximately twelve inches deep. (T. II, 327-328).

When the grave had been completed, Stanley untied the insurance man from the tree, but left his hands bound. (T. II, 331). With blood flowing from the victim's forehead where Respondent had hit him with a hammer, Respondent ripped part of the shirt from the victim's back and stuffed it in the victim's mouth to prevent him from yelling. (T. II, 332). As the men approached the grave, the victim stumbled and fell into it. As the victim lay in the grave, Stanley handed the gun to Respondent and told Respondent, "you gonna do the rest . . ." (T. II, 334).

Taking the gun, Respondent turned his head and pointed the gun at the victim's head, firing five times.

(T. II, 334). Stanley then took the shovel that had been used to dig the grave and hit the victim twice. Stanley handed the shovel to the Respondent and Respondent beat the man with the shovel, striking the victim once in the stomach, twice in the head and one time in the chest. (T. II, 336). The victim was still alive when Stanley began to shovel dirt over the lower part of the victim's body. When Stanley had partially buried the victim, Stanley handed the shovel to the Respondent who then began to shovel dirt over the victim's head. Through all of this, the victim was not only struggling for breath, but as the dirt began to cover his head, he was attempting to say something. (T. III). According to Respondent, the insurance man pled for his life on two occasions. (T. II, 369).

When Clifford Floyd, bleeding, battered, but still breathing, was completely covered in his shallow grave, Respondent and Stanley left, and Respondent returned to his house. (T. II, 337). After Respondent finished supper, Stanley returned to the Thomas house and they moved the victim's car from where it had been hidden earlier and drove down to an old logging road where the car eventually got stuck. The car was ultimately discovered by law enforcement officials. (T. II, 350). An autopsy revealed that the victim, who had a gunshot wound, numerous lacerations, a skull fracture, a broken sternum and brain hemorrhaging, either strangled or suffocated on his own blood within thirty minutes after he lay buried in his shallow grave. (T. III, 343-345).

As the Supreme Court of Georgia noted in its opinion in Respondent's direct appeal to that court, the following evidence also clearly tied Respondent to the crime:

> Beginning the next day, four anonymous telephone calls were made to police telling them where they could

> find the car and giving misleading information about the victim. Through a telephone tap, one of these calls was traced to Thomas' home. When police arrived, he was the only one at home. He [Respondent] subsequently admitted making the call.

Thomas v. State, 240 Ga. 393, 395, 242 S.E.2d 1 (1977), *cert. denied*, 436 U.S. 914, *rehearing denied*, 438 U.S. 908 (1978).

The Supreme Court of Georgia also noted that:

> Thomas was arrested two days after the murder and confessed in intricate detail to this crime. His confession was tape-recorded seven days after the murder and was introduced at the trial. He took the stand and testified that he had no memory of the incident after ingesting two pills given or sold to him by "some dude" in Macon. He also claimed no memory of the telephone call or of the confession given seven days later.

Petitioner submits that Respondent's assertion that he had no memory of the crime based on "voluntary intoxication", was patently frivolous in light of the overwhelming evidence of his guilt.[1]

In light of the overwhelming evidence presented against the Respondent by the State, Petitioner submits that any alleged *Sandstrom* error should be found to be harmless beyond a reasonable doubt under the harmless error rule of *Chapman v. California, supra.* Petitioner

---

[1]O.C.G.A. § 16-3-4(c) contains the provision that, "voluntary intoxication shall not be an excuse for any criminal act or omission." However, the trial court erroneously charged the jury, upon request of Respondent's counsel, concerning voluntary intoxication, as a defense and the Eleventh Circuit concluded that the presentation of the testimony of Respondent and the charge of the Court placed Respondent's intent into issue.

further submits that the frivolous nature of Respondent's defense also provides the appropriate setting for the application of the harmless error rule to an alleged *Sandstrom* violation.

Petitioner notes that this Court has recently granted certiorari to consider the application of the harmless error rule to alleged *Sandstrom* violations in *Rose v. Clark*, No. 84-1974, *cert. granted* (October 7, 1985).

—o—

CONCLUSION

For all of the above and foregoing reasons, Petitioner submits that this Court should grant a writ of certiorari to review the application of the harmless error rule to an alleged *Sandstrom* violation in a context where a criminal defendant presents a frivolous defense and the State has overwhelmingly proven the defendant's guilt, beyond a reasonable doubt.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

THOMASVILLE DIVISION

CIVIL ACTION NO. 80-65-THOM.

JOSEPH THOMAS,

Petitioner,

VS.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent

JUDGMENT

Pursuant to an Opinion and Order of The Honorable Judge J. Robert Elliott, United States District Judge, signed on July 10, 1981 and Filed on July 17, 1981, and for the reasons stated therein:

IT IS ORDERED AND ADJUDGED that the relief sought by the Petitioner is denied and it is directed that the Petition be Dismissed and the Petitioner is remanded to the custody of the Respondent so that the sentence heretofore imposed by the state court may be carried out according to law.

This, the 17th day of July, 1981.

GIRARD W. HAWKINS, CLERK

/s/ J. LUNDIE SMITH

By: J. Lundie Smith
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-65-THOM

JOSEPH THOMAS,

Petitioner

v.

WALTER D. ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent

OPINION AND ORDER

Filed at 10:30 A.M.
JUL 17, 1981
J. Lundie Smith
Deputy Clerk, U.S. District Court

Petitioner Thomas along with a co-defendant, Ivon Stanley, was convicted in the Superior Court of Decatur County, Georgia, in April, 1976, for the murder of Clifford Floyd. He was also convicted of kidnapping with bodily injury. Succinctly stated, the record shows that Thomas together with Stanley robbed the victim at gunpoint and took him to some woods where the victim was struck with a hammer, tied to a tree, made to lie in a shallow grave, beaten and jabbed with a shovel in the head, throat and chest, shot with a pistol and buried alive while he was pleading with Thomas and Stanley to stop. Petitioner's convictions and death sentences for murder and kidnapping with bodily injury were affirmed. See *Thomas v. State*, 240 Ga. 393 (1977), cert. den. 436 U.S. 914, reh. den. 438 U.S. 908 (1978).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, where he was denied relief and was denied a certificate of probable cause to appeal to the Supreme Court of Georgia. His petition for a writ of certiorari was denied by the United States Supreme Court on February 19, 1980 in *Thomas v. Zant,* — U.S. — (Case No. 795714). The Petitioner then refiled a habeas corpus petition in the Butts Superior Court and thereafter filed the petition which is now before this Court.

In his state habeas corpus proceeding the first contention made by the Petitioner (and here repeated) was that he was denied the effective assistance of trial counsel, primarily because of an alleged failure of the trial attorney to investigate and secure witnesses to testify on mitigating evidence during the punishment phase of trial.

Petitioner has not shown his trial attorney to have been ineffective. If his contention is that the trial attorney failed to provide evidence in mitigation, that contention is unfounded and is belied by the record and the findings of the state habeas court. What Petitioner is doing is simply reviewing his trial several years later and in hindsight attempting to show that his trial attorney was ineffective for not placing before the jury evidence which would have been redundant in nature. Indeed, it is quite questionable whether the evidence asserted by the Petitioner as "mitigating" would have been viewed by the jury as such. In any event, the conduct of the trial by Petitioner's trial attorney was certainly reasonably effective assistance of counsel. Petitioner was given a full and fair opportunity to develop this issue in the state habeas corpus

proceedings and was unable to establish his contention. The state habeas corpus court has properly ruled on this issue and this Court, applying federal legal standards to the facts so developed, concludes that this issue is without merit.

The next issue presented in this petition alleges that the Petitioner's death sentence was based at least in part upon an unconstitutional application of Georgia Code Annotated § 27-2534.1(b)(7) contrary to the admonitions of the United States Supreme Court in *Godfrey v. Georgia*, — U.S. —, 100 S.Ct. 1759 (1980). The record in this case shows that the jury was instructed on the statutory aggravating circumstances and that those circumstances were supported by the evidence and that the jury was correctly instructed by the trial court and that the determination made by the jury was justified. Under the facts of this case as shown by the transcript of the evidence it is clear that the offenses for which the Petitioner was convicted "were outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim". The state habeas corpus court concluded that this contention was without merit and this Court agrees with that conclusion.

The next contention made by the Petitioner is that he was denied his constitutional rights because the trial court refused to appoint a variety of experts who he contends would have been helpful witnesses in his defense. He made this same contention in his direct appeal and in his petition for writ of certiorari to the United States Supreme Court, and in this connection it need only be noted that the State is not required to bear the cost of expert witnesses at the whim of an indigent defendant, particu-

larly when it appears as here that the testimony of such witnesses would be either duplicative of other witnesses or would be irrelevant. The Petitioner has made no showing whatever that the additional expert witnesses would have been of any benefit in his defense. On the contrary, it clearly appears that their testimony would have been either duplicative or irrelevant, and under these circumstances the trial court's refusal to appoint additional expert witnesses did not deprive the Petitioner of his right to due process or equal protection, this allegation, therefore, providing no basis for habeas corpus relief.

The next contention made by the Petitioner is that he was sentenced to death for the non-capital offense of simple kidnapping. This contention appears to be simply erroneous because the indictment alleges specifically that the kidnapping occurred with bodily injury and the law in Georgia is well settled that the death of a victim constitutes that "bodily injury" contemplated in the statute. This asserted ground presents no reason for granting habeas corpus relief. Incidentally, it does not appear that the Petitioner has raised this particular issue in any previous proceedings, but we have nevertheless dealt with it.

Petitioner's next contention is that the trial judge did not properly instruct the jury on the burden of proof. It is this Court's view that the trial court completely and fairly charged the jury on the burden of proof contrary to the contention of the Petitioner. Although it does not appear that the Petitioner has previously raised this issue, we have nevertheless dealt with it and determine it to be without merit.

Petitioner's next allegation is that certain statements that he made were improperly admitted into evidence and he ties this contention to a contention that his arrest was improper. Neither of these contentions are supported by the record.

Petitioner next raises a search and seizure question. The Court determines that this issue is not properly cognizable in this proceeding.

Petitioner's next enumeration is that a tape recording and transcript of his confession were unreliable and inadmissible. The Supreme Court of Georgia dealt with this contention in reviewing the Petitioner's conviction and found the evidence to have been properly admitted as a matter of state law and the conclusion reached by the Georgia Supreme Court seems to be completely authorized by the record and the applicable law.

The Petitioner next contends that the prosecution violated his privilege against self-incrimination by commenting about his refusal to discuss the facts of the case with a psychiatrist who had been appointed to evaluate the Petitioner's condition. This issue was raised in the state habeas corpus court and was there fully evaluated and the Petitioner's contention was determined to be without merit. Indeed, the record does not indicate that the District Attorney made any argument whatever concerning the Petitioner's post-arrest silence. This allegation furnishes no basis for habeas corpus relief.

Petitioner's next allegation is that the death penalty is unconstitutional unless there is a showing of purpose to cause the death of the victim. Even if this were an accurate statement of the law it would not be applicable in this

case because under the facts of this case as disclosed by the record it cannot be seriously argued that the evidence did not establish beyond a reasonable doubt the Petitioner's clear intention to kidnap, rob and murder Clifford Floyd. That the homicide in this case was intentional and deliberate seems to this Court to be beyond dispute.

The next contention made by the Petitioner is that the death penalty for kidnapping is improper because the penalty should not be imposed for any crime other than murder. We have already dealt with this matter in discussing an earlier contention made by the Petitioner. There appears to be no legal basis for the assertion made by the Petitioner, but in any event, the Petitioner was not convicted of simple kidnapping, but was convicted of kidnapping with bodily harm (murder).

The next contention made by the Petitioner is that the prosecuting attorney made improper argument to the jury during the sentencing phase of the trial. It is noted that no objection was made at the time of trial to the prosecuting attorney's argument. The question was raised for the first time on appeal. The Supreme Court of Georgia gave consideration to this contention and concluded that the closing argument of the District Attorney did not provide any basis for reversal of his conviction, that Court concluding that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor, and this Court likewise concludes that this contention made by the Petitioner provides no basis for the granting of federal habeas corpus relief.

In his next enumeration the Petitioner complains that his death penalty for kidnapping was based at least in part

on the aggravating circumstances that the kidnapping was committed while the Petitioner was engaged in other capital felonies, to-wit, murder and armed robbery, and since his conviction for armed robbery was later vacated his death sentence for kidnapping must, therefore, be invalid. This contention is obviously without merit and provides no grounds for habeas corpus relief.

Petitioner's next contention is that the trial court's instructions at the sentencing phase of the case were inadequate to inform the jury that a verdict of life imprisonment could be returned even if aggravating circumstances were found to exist. A review of the trial court's instructions shows that the trial court gave clear instructions on this point and the Supreme Court of Georgia discussed this feature in its opinion affirming the Petitioner's conviction. This contention is clearly without merit.

The next contention made by the Petitioner does not appear to have been heretofore raised in any proceeding, but we will nevertheless address it. The Petitioner's contention is that he was not given timely notice of aggravating circumstances. It is doubtful that the law requires that the Defendant be given such notice, but even if the law does require it, the record in this case shows that the District Attorney did serve notice of aggravating circumstances on counsel for the Petitioner several months before the trial.

The Court notes that the Petitioner presents some other contentions in this habeas corpus petition which are not properly before this Court because they were not urged by the Petitioner before the courts of the State of Georgia, but even if they were properly before this Court

for consideration the record indicates that they are without merit.

In summary, this Court determines that the Petitioner has had a full and fair opportunity to present any issue which he desired to present to the courts of the State of Georgia and that he was given ample opportunity to present evidence and did in fact present evidence with regard to any issue asserted and that the contentions made by the Petitioner were addressed fully by the state courts and under the standards set forth in 28 U.S.C. § 2254(d) the findings of fact thus made by the state court after a full and fair hearing on the merits should by this Court be presumed to be correct, the state court proceedings not falling within any statutory exceptions which would rebut such presumption of credibility. The findings of fact made by the state court are fully supported by the evidence developed at the hearing. This Court, therefore, accepts the findings of fact contained in the state court's order, applies federal legal standards to those factual determinations, and concludes that the Petitioner is not entitled to a federal evidentiary hearing and that such a hearing would not benefit this Court in addressing the Petitioner's allegations.

Consistent with the foregoing, the relief sought by the Petitioner is denied and it is directed that the petition be dismissed and the Petitioner is remanded to the custody of the Respondent so that the sentence heretofore imposed by the state court may be carried out according to law.

IT IS SO ORDERED this 10th day of July, 1981.

/s/ J. Robert Elliott

UNITED STATES DISTRICT JUDGE

APPENDIX B

Joseph THOMAS, Petitioner,

v.

Walter D. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

No. 81-7675.

United States Court of Appeals, Eleventh Circuit.

Feb. 10, 1983.

Petitioner appealed from an order of the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., which refused to order an evidentiary hearing on federal constitutional claim and denied his petition. The Court of Appeals, Vance, Circuit Judge, held that federal evidentiary hearing was required at least on threshold issue of whether petitioner's state habeas counsel's failure to offer trial counsel's testimony or affidavit, which admitted that she made no investigation or preparation for penalty phase of trial, was due to inexcusable neglect or deliberate bypass on part of petitioner, who claimed that his trial counsel was constitutionally ineffective in failing to investigate or prepare for penalty phase of the trial; thus, if district court concluded initially that petitioner did not waive the right to present the evidence at the state habeas proceeding or that failure to present the evidence did not result from deliberate bypass or inexcusable neglect, then petitioner was entitled to further evidentiary hearing on merits of his trial coun-

sel's ineffectiveness claim and state fact-finding on the issue was not entitled to presumption of correctness.

Reversed and remanded.

Fay, Circuit Judge, specially concurred.

* * *

Joseph M. Nursey, Millard C. Farmer, Andrea I. Young, Atlanta, Ga., for petitioner.

Daryl A. Robinson, Atlanta, Ga., for respondent.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY, VANCE and ARNOLD*, Circuit Judges.

VANCE, Circuit Judge:

In January 1977 appellant Joseph Thomas and his codefendant Ivon Ray Stanley were sentenced to death in separate proceedings for the armed robbery, kidnapping and murder of Clifford Floyd. The Supreme Court of Georgia affirmed the convictions and sentences for murder and kidnapping and vacated the conviction and sentence for armed robbery. *Thomas v. State,* 240 Ga. 393, 242 S.E.2d 1 (1977), *cert. denied,* 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978).

Thomas then filed a state habeas corpus petition alleging that his trial counsel was constitutionally ineffective in failing to investigate or prepare for the penalty phase of the trial. An evidentiary hearing was held, at which Thomas was represented by new counsel. Thomas presented a number of witnesses at the hearing who testified that they would have been willing to appear during

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* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

the punishment stage of the trial.[1] The court denied relief and denied a certificate of probable cause to appeal to the Supreme Court of Georgia. The United State Supreme Court denied certiorari. *Thomas v. Zant*, 444 U.S. 1103, 100 S.Ct. 1068, 62 L.Ed.2d 788 (1980).

Thomas filed a second state habeas corpus petition, alleging that counsel representing him at the earlier state habeas hearing had been ineffective. Following denial without hearing of this second petition, Thomas petitioned in federal court pursuant to 28 U.S.C. § 2254. The district court refused to order an evidentiary hearing and denied the petition. In its order denying the motion for a hearing, the district court reasoned that:

> A review of the Petitioner's motion shows that the proposed depositions and affidavit would relate to the question of ineffective assistance of counsel and

---

1. Thomas contends that among the evidence of mitigation which could have been presented with minimal diligence by trial counsel was the following:

   a) that he had no prior record of criminal offenses either as an adult or as a juvenile;

   b) that he had no prior history of violence and was never a disciplinary problem;

   c) that prior to his arrest he was regularly and gainfully employed and that he fully supported himself and assisted in supporting his parents and six younger siblings.

   d) that he raised hogs to contribute to the support of his family;

   e) that he regularly attended church and Sunday School;

   f) that he had a good reputation in his community;

   g) that while his older brother was in the service Thomas took care of his brother's children;

   h) that he is a talented artist and that he could be productive in prison by further developing his artistic skills.

> this precise issue was presented to the Superior Court of Butts County, Georgia sitting as the state habeas corpus court and the Petitioner at that time had ample opportunity to present any evidence which he desired to present dealing with this question, and in fact did introduce the testimony of a number of witnesses. The identical issue was also presented to the Supreme Court of Georgia as a basis for granting Petitioner a certificate of probable cause to appeal the order of the state habeas corpus court which had denied the relief sought by the Petitioner. After a review of the matter the Supreme Court of Georgia denied the Petitioner's application. Thereafter the same issue was presented again to the Supreme Court, which denied the petition for a writ of certiorari. It is now this same issue concerning which the Petitioner desires to supplement the evidentiary record and it is obvious that the additional evidence would be no more than cumulative on the same issue.

Thomas raises nine issues on appeal. Because we agree with him that the district court prematurely denied the petition without first holding an evidentiary hearing, we need not reach the remaining issues.

Thomas argues that the district court erred in denying his motion for an evidentiary hearing to allow the presentation of evidence on the issue of ineffective assistance of counsel at the penalty stage of his trial. Although Thomas acknowledges that the very issue of ineffective counsel was the subject of a state habeas proceeding, he argues that the record of that proceeding lacked crucial evidence "indispensible to a fair, rounded, development of the material facts." *Townsend v. Sain*, 372 U.S. 293, 321-22, 83 S.Ct. 745, 762, 9 L.Ed.2d 770 (1963). Included in that evidence is the affidavit of Thomas' trial counsel, in which counsel admitted that she had made no investiga-

tion or preparation for the penalty stage of the trial. Thomas further contends that the failure of his state habeas counsel to obtain and present the affidavit cannot be attributed to Thomas' "inexcusable neglect." *Id.* at 317, 83 S.Ct. at 759. Thomas argues that because "material facts were not adequately developed at the State court hearing," 28 U.S.C. § 2254(d)(3) and because the failure to so develop the facts was not his fault, the district court erred in applying a presumption of correctness, 28 U.S.C. § 2254(d),[2] to state findings of fact.

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2. 28 U.S.C. § 2254(d) provides in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) *that the material facts were not adequately developed at the State court hearing;*
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

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Thomas' first contention is that the state habeas court made no findings of the "basic, primary or historical facts," *Townsend v. Sain*, 372 U.S. at 309 n. 6, 83 S.Ct. at 755 n. 6, which give rise to a presumption of correctness under section 2254(d). *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1981); *Goodwin v. Balkcom*, 684 F.2d 794, 803-04 (11th Cir.1982); *Young v. Zant*, 677 F.2d 792, 794 n. 2 (11th Cir.1982); *Mason v. Balkcom*, 531 F.2d 717, 721 (5th Cir.1976). In *Mason v. Balkcom*, 531 F.2d at 722, however, we noted that "specific historical facts found by a state habeas court (such as what an attorney did for his client), to which a standard of law is applied in deciding a mixed question of fact and law, do merit section 2254(d)'s presumption of correctness in a federal habeas proceeding provided of course that those facts were adequate and fairly supported by the record." In the present case, the state habeas court made the primary factual finding that Thomas' counsel's decision to forego

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(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.] (emphasis added).

presentation of evidence at the penalty stage of the trial was an "apparent tactical decision."[3]

That determination is the sort of purely historical factfinding that receives the presumption of correctness under section 2254(d), unless one or more of the eight factors listed in section (d) can be shown to exist. Thomas contends that he comes squarely within section (d)(3): the affidavit of his trial counsel bears directly on a material fact not adequately developed at the state proceeding. We agree.

[1] The standards applicable to evidentiary hearings involving material facts not adequately developed at the state proceeding are governed by *Townsend v. Sain* and section (d) of the federal habeas corpus statute, 28 U.S.C. § 2254, which was added to the federal habeas statute in 1966. The interrelationship between them requires some elucidation. *Townsend v. Sain* delineated the criteria for determining when an evidentiary hearing would be mandated in federal habeas corpus and when it would be a matter for the district court's discretion. Charles Townsend had been convicted in state court of capital murder. The state courts rejected Townsend's contention that his confession was coerced because he had been administered a truth serum drug immediately prior to the confession.

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3. The state habeas court concluded that:

> In view of the case made against Petitioner and the type of defense presented, it cannot be said that counsel, *in an apparent tactical decision,* was ineffective by not offering further evidence. To do so, and introduce what could be termed as evidence of good character, would have been to invite rebuttal from the prosecution designed to discredit both Petitioner's character and testimony of lack of culpability. (emphasis added).

Lay and expert testimony at trial disclosed the identity of the drug but not that it was a "truth serum." *Id.* 372 U.S. at 321 n. 13, 83 S.Ct. at 761 n. 13. After exhausting his state remedies, Townsend filed for federal habeas relief. The district court denied the petition without holding an evidentiary hearing. The Supreme Court reversed and ordered a hearing to determine if the confession had in fact been coerced.

The Court held that "a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing *reliably* found the relevant facts." Id. at 312, 83 S.Ct. at 757 (emphasis added). Chief Justice Warren's opinion then catalogued six circumstances in which a full plenary evidentiary hearing would be required even though the state court had made findings of fact.[4] The Court observed, as its fifth enumerated circumstance, that such a hearing must be held whenever "the material facts were not adequately developed at the state-court hearing." *Id.* at 313, 83 S.Ct. at 757. The Court explained that if, "for any reason not attributable to the *inexcusable neglect*

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4. The six circumstances delineated by the *Townsend* Court were:

> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) *the material facts were not adequately developed at the state-court hearing;* or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313, 83 S.Ct. at 757. (emphasis added).

of petitioner, *see Fay v. Noia*, [372 U.S. 391, 438, 83 S.Ct. 822, 848-49, 9 L.Ed.2d 837 (part V) (1963)], evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 759 (emphasis added). The *Townsend* Court thus defined the inexcusable neglect standard in terms of a *Fay v. Noia*[5] deliberate bypass. The Court in *Fay*, in turn, keyed deliberate bypass to the standard for waiver of constitutional rights articulated in *Johnson v. Zerbst*, 309 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938): "an intentional relinquishment or abandonment of a known right or privilege." *See also Guice v. Fortenberry*, 661 F.2d 496, 506-07 (5th Cir.1981) (en banc) (sum-

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5. The *Fay* Court observed:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief.

372 U.S. at 439, 83 S.Ct. at 849. (footnotes and citations omitted).

marizing the relationship between *Townsend*, *Fay*, and *Zerbst*.[6]

The deliberate bypass test posed the danger that counsel might strategically withhold evidence or sandbag. This possibility was noted by judges who commented on *Town-*

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6. In *Townsend* itself, the "crucial fact" not disclosed by the experts testifying at the state suppression hearing was that the substance injected into Townsend prior to his confession had "properties which may trigger statements in a legal sense involuntary." *Townsend v. Sain*, 372 U.S. at 321, 83 S.Ct. at 761.

The Court went on to explain:

> This fact was vital to whether his confession was the product of a free will and therefore admissible. To be sure, there was medical testimony as to the general properties of hyoscine, from which might have been inferred the conclusion that Townsend's power of resistance had been debilitated. But the crucially informative characterization of the drug, the characterization which would have enabled the judge and jury, mere laymen, intelligently to grasp the nature of the substance under inquiry, was inexplicably omitted from the medical experts' testimony. Under the circumstances, disclosure of the identity of hyoscine as a "truth serum" was indispensable to a fair, rounded, development of the material facts. And the medical experts' failure to testify fully cannot realistically be regarded as Townsend's inexcusable default. *See Fay v. Noia.*

Id. 372 U.S. at 321-22, 83 S.Ct. at 761-62. Thus, counsel's failure to draw information out of witnesses who were in court and testifying did not, for the *Townsend* Court itself, constitute deliberate bypass. As one commentator aptly noted, "with a little more imaginative questioning or out-of-court research, counsel might have been able to infer the qualities of the drug from what he already knew. Even so, his neglect did not bind petitioner." Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1131 n. 78 (1978); *see also* Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility, 74 Yale L.J. 895, 971 n. 273 (1966).

send.[7] Subsequent decisions, however, have brought the deliberate bypass test within manageable limits. In *Henry v. Mississippi*, 379 U.S. 443, 451, 85 S.Ct. 564, 569, 13 L.Ed.2d 408 (1965), for example, the Court put to rest the suggestion in *Fay* and *Zerbst* that only the defendant him-

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7. Judge Wright termed the "inexcusable neglect" standard of *Townsend* "the most difficult limitation [on the fifth circumstance] to apply." Wright & Sofaer, *supra*, note 6 at 960. Judge Caffrey observed in The Impact of the Townsend and Noia Cases on Federal District Judges, 33 F.R.D. 446, 450-51 (1963) that:

> The 5th guide line laid down requires a hearing if the material facts "were not adequately developed at the State court hearing." This category is cross-referenced by the Chief Justice to the "inexcusable neglect" test of *Fay v. Noia*. I take this guide line to mean that if the district judge finds that evidence "crucial to the adequate consideration of the constitutional claim" was not developed at the State hearing, a Federal district judge is compelled to hold a full evidentiary type hearing, unless the petitioner runs afoul of the "inexcusable default" described in *Fay v. Noia*. This, in turn, means that a failure to develop the constitutional claim in state court will be held against the applicant only if he can be found to have knowingly and intelligently waived his right to do so personally and not through counsel, under the test set out in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 [1023], 82 L.Ed. 1461.
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> Thus, it appears that this test may result in much second-guessing of the strategy employed by defense counsel in state court criminal trials. Defense counsel will be criticized for developing a case in State court one way rather than another. For example, the lawyer who represented Townsend omitted from his presentation of the defense only the words "truth serum" and his failure to use this phrase would appear to be the key to the successful attack on the State court trial.
>
> I suspect that the phrase "evidence crucial to the adequate consideration of the constitutional claim" will spawn litigation revolving around the meaning of the words "crucial" and "adequate."

self could make an effective waiver of constitutional rights. The Court held that counsel's decisions on trial strategy might "amount to a waiver binding on petitioner [which] would preclude him from a decision on the merits of his federal claim . . . ." *See also Coco v. United States,* 569 F.2d 367, 371 (5th Cir.1978); *Aaron v. Caps,* 507 F2d 685, 690-92 (5th Cir.1975) (appendix); *Winters v. Cook,* 489 F.2d 174, 180 (5th Cir.1973) (en banc).

Concerns about sandbagging by counsel also proved important to the Supreme Court in its disposition of the state procedural default cases. In *Davis v. United States,* 411 U.S. 233, 241, 93 S.Ct. 1577, 1582, 36 L.Ed.2d 216 (1973) and *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Court expressed concern that the *Fay* deliberate bypass test encouraged attorneys to ignore state contemporaneous objection rules and to refrain from objecting at trial and thus to build error into the record. *Davis* and *Sykes* replaced *Fay's* deliberate bypass standard with a more stringent "cause and prejudice test," at least in situations where a prisoner fails to follow a state procedural rule. *See also United States v. Frady,* 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (procedural default); *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) (same); *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976) (same); *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (barring federal habeas review of fourth amendment claims when the state courts provided a full and fair chance to litigate those claims).

Despite the rejection of the deliberate bypass standard in the procedural default and fourth amendment

settings, the *Fay* test remains intact and workable in the context of the *Townsend* issue. In *Guice v. Fortenberry*, 661 F.2d 496, 507 n. 25 (5th Cir.1981) (en banc) the fifth circuit held that "neither the Supreme Court nor this Court has ever suggested that the standard developed in *Francis* and adopted in *Sykes* should replace the deliberate bypass standard in the *Townsend* inquiry. Indeed, the policies relied upon in those cases, federalism, comity and concerns for the orderly administration of criminal justice, do not apply when the prisoner has challenged the violations throughout the state process and the state has held proceedings directed at the constituional claim reasserted in a federal habeas court." *See also Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (Powell, J. concurring); Hart, The Supreme Court, 1958 Term-Foreword: The Time Chart of the Justices, 73 Harv.L.Rev. 84, 101-119 (1959) (delineating the theoretical implications of distinguishing state procedural default and waiver of constitutional rights). The *Guice* court applied the deliberate bypass standard of *Fay-Zerbst* in ordering a remand for a federal evidentiary hearing:

> The neglect of Guice and Claxton to develop the crucial facts is not explained by the record. There is no substantial allegation that the petitioners made a tactical choice to leave the evidence undeveloped. It appears more likely that, based on the inartful and scattershot nature of the various motions, the defendants and their attorneys did not appreciate fully the relevance of the missing evidence. Such neglect is not inexcusable within the meaning of *Fay v. Noia*. The Court in *Townsend* noted that an expert witness "inexplicably" failed to develop the "crucially informa-

tive characterization" of the drug involved as a "truth serum."

Id. at 507.[8]

Thus, *Townsend,* and by reference *Fay* and *Zerbst,* teach that only a deliberate bypass or inexcusable neglect on a petitioner's part in failing to develop material facts at prior proceedings will prevent a petitioner from securing a federal evidentiary hearing under the fifth circumstance of *Townsend.* The concepts of deliberate bypass and waiver of constitutional rights have been extensively elaborated in the case law binding on this court. *See Buckelew v. United States,* 575 F.2d 515, 519 (5th Cir. 1978); *Coco v. United States,* 569 F.2d 367, 369-71 (5th Cir.1978); *Jiminez v. Estelle,* 557 F.2d 506, 508-09 (5th Cir.1977); *McKnight v. United States,* 507 F.2d 1034, 1036-37 (5th Cir.1975); *Aaron v. Capps,* 507 F.2d 685 (5th Cir. 1975); *Morris v. United States,* 503 F.2d 457, 459 (5th Cir.1974); *Winters v. Cook,* 489 F.2d 174, 176-81 (5th Cir.1973) (en banc), *Montgomery v. Hopper,* 488 F.2d 877. 879 (5th Cir.1973). Further, deliberate bypass and inexcusable neglect derive content from the parallel development of the abuse of the writ doctrine. That doctrine, which governs successive federal habeas applications, states that inexcusable neglect or deliberate bypass constitutes an abuse of the habeas writ. *See McShane v. Estelle,* 683 F.2d 867 (5th Cir.1982); *Vaughan v. Estelle,* 671 F.2d 152 (5th Cir.1982); *Potts v. Zant,* 638 F.2d 727 (5th Cir.), *cert. de-*

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8. The second circuit also appears to apply the *Fay* standard to *Townsend* cases even after *Sykes* and its progeny. *See Walker v. Wilmot,* 603 F.2d 1038, 1041 (2d Cir.1979), *cert. denied,* 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980).

nied, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *Paprskar v. Estelle,* 612 F.2d 1003 (5th Cir.), *cert. denied,* 449 U.S. 835, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980); *Haley v. Estelle,* 632 F.2d 1273 (5th Cir.1980); *Mays v. Balkcom,* 631 F.2d 48 (5th Cir.1980).

This, then, was the state of the law derived from *Townsend.* In 1966 Congress added section (d) to 28 U.S.C. § 2254. *See* note 2 *supra.* Section (d) provides that a state factual determination that is "supported by reliable and adequate written indicia, shall be presumed to be correct" unless the petitioner can establish or it otherwise appears that the state proceeding was deficient in one of eight specified respects. The amendment essentially retains all of the *Townsend* categories with some slight changes in phrasing and adds three additional categories, though these three categories "would not appear to change the law," P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1505 n. 7 (2d ed. 1973). The third of the section 2254(d) factors is virtually identical to the fifth circumstance listed in *Townsend.* The *Townsend* Court's standard was that a federal evidentiary hearing must be held if "the crucial facts were not adequately developed at the State court hearing." Section 2254(d)(3) substitutes the word "material" for "crucial."

The question of what effect, if any, the new amendment has upon the law derived from *Townsend* and its progeny has been left open by the Supreme Court.[9] Re-

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9. The Supreme Court has mentioned the issue several times in passing. *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708,

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cently, the fifth circuit in *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir.1981) (en banc) held that *Townsend* (including its inexcusable neglect and deliberate bypass corollaries) governs the threshold issue of whether or not to hold a federal evidentiary hearing at all, while section (d) allocates the burdens of proof once a *Townsend* hearing is deemed necessary. The en banc court observed that although in some sense the 1966 amendment "codified" the *Townsend* criteria, "*Townsend* was not completely superseded by the amendment, for the Supreme Court [in *Townsend*] decided when a federal evidentiary hearing is mandatory while the habeas corpus statute, as amended, merely establishes a presumption that the state court judgment is correct unless the applicant establishes one of a number of specific reasons to disregard it." *Id.* at 501.

The sparse legislative history of the 1966 amendment suggests that Congress intended to supplement, rather than supersede, *Townsend*. First, the Report of the Com-

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1714, 64 L.Ed.2d 333 (1980) termed *Townsend* the "precursor" of 2254(d). In *Wainwright v. Sykes*, 433 U.S. 72, 80, 97 S.Ct. 2497, 2503, 53 L.Ed.2d 594 (1977), the Court stated:

> The duty of the federal habeas court to hold a factfinding hearing in specific situations, notwithstanding the prior resolution of the issues in state court, was thoroughly explored in this Court's later decision in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Congress addressed this aspect of federal habeas in 1966 when it amended § 2254 to deal with the problem treated in *Townsend*. 890 Stat. 1105. *See LaVallee v. Delle Rose*, 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973).

See also Guice v. Fortenberry, 661 F.2d at 506 (listing cases suggesting that § 2254(d) "merely codified" *Townsend*).

mittee on Habeas Corpus, Judicial Conference of the United States, stated that the goal of the amendment was to provide a limited res judicata to state factfindings and that section (d) was "designed to create reasonable presumptions and fix the party on whom the burden of proof, as to certain factual issues, shall rest in such proceedings, but without the impairment of any of the substantive rights of the applicant." Report of the Committee on Habeas Corpus (September 1965), Judicial Conference of the United States, attached to S.Rep. No. 1797, 89th Cong. 2d Sess. (1966), 1966 U.S. Code Cong. & Ad.News 3663, 3669, 3671. This report is significant because the legislation had been sponsored and endorsed by the Judicial Conference, *id.* at 3663, and language identical to that quoted above appears in the "Purpose of Amendments" section of H.R.Rep. 1892, 89th Cong.2d Sess. 3 (1966). *See also* Letter from the Honorable Orie Phillips to the Honorable Joseph D. Tydings (September 24, 1966), *reprinted in* 1966 U.S.Code Cong. & Ad.News 3666, 3666 (noting that the goals of the amendment were to be attained "by provisions with respect to the burden of proof in Federal court proceedings for habeas corpus by State prisoners"). Further, the Senate Judiciary Committee's Report on the amendment, S.Rep. No. 1797, 89th Cong.2d Sess. (1966), 1966 U.S.Code Cong. & Ad.News 3663, 3663 stated that the purpose of the amendment was to revise the "*procedures* applicable to review by lower Federal Courts" of petitions by state prisoners. (emphasis added). *See also* H.R.Rep. No. 1892, 89th Cong. 2d Sess. 3 (1966) (same).

Secondly, the Senate Judiciary Committee's Report, S.Rep. No. 1797 *supra* at 3665, and the House Judiciary

Committee's Report, H.R.Rep. No. 1892, *supra* at 9, both noted that section (d) provides "that *at the evidentiary* hearing in the Federal court when proof of the State court's factual determination has been made, unless [one of the eight listed categories is present], the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous." (emphasis added). The statement that the eight categories apply "at the evidentiary" hearing suggests that determination of the propriety of having a hearing at all is controlled by *Townsend*.

Thirdly, the language and legislative history of section (d) are silent on the issue of defense sandbagging. The most reasonable explanation for this silence is that the *Townsend* analysis governs whether to hold a hearing (which depends on whether there was deliberate bypass or inexcusable neglect), while section (d) controls the burdens of proof at such hearings. The legislative history of section (d) leaves no doubt that Congress passed the amendment out of a concern for strain on the federal courts caused by a burgeoning number of habeas petitions. *See* H.R.Rep. No. 1892, 89th Cong. 2d Sess. (1966) 6-7, 18-35 (figures cited in appendices I, II and III); S.Rep. No. 1797, 89th Cong. 2d Sess. (1966), *reprinted in* U.S.Code Cong. & Ad.News 3663-64; Report of the Committee on Habeas Corpus, *supra* at 3670-71. Given this concern, the only reason Congress would remain silent on the sandbagging issue is if it thought the issue had *already* been settled by *Townsend's* deliberate bypass/inexcusable neglect criteria.[10] *But see* Advisory Committee Note to Rule

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10. Neither the language nor the legislative history of the 1966 amendment state whether Congress intended to ratify the deliberate bypass standard of *Fay*.

8 of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254, effective 1977 (observing that "the standard set down in *Townsend* . . . determines *when* a hearing in the federal habeas proceeding is mandatory" (emphasis in original) but also stating that "the circumstances under which a federal hearing is mandatory are now specified in 28 U.S.C. § 2254(d)").

Townsend and section 2254(d) complement each other. The 1966 amendment tracks *Townsend,* but "it is not a direct statutory codification of *Townsend*" on the question of whether a district court should hold an evidentiary hearing:

> Though not free from ambiguity, the language of the amendment apparently assumes that the decision to hold an evidentiary hearing has already been made, pursuant either to *Townsend's* mandate or the judge's discretionary power, and attempts to set the burden and standard of proof for that hearing. Indirectly the statutory language and the *Townsend* rules do reinforce each other. If a state judgment is no longer presumed correct under the statute, *Townsend* would seem to require a hearing so the habeas judge can draw the conclusions of fact needed. Conversely, if *Townsend* indicates sufficient unreliability in the state conclusions so that a new hearing is required, it is reasonable to refuse to give weight to the former conclusions in the new hearing.

Developments in the Law-Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1141-42 (1970). *Accord LaVallee v. Rose,* 410 U.S. 690, 702 n. 2, 93 S.Ct. 1203, 1209 n. 2, 35 L.Ed.2d 637 (1973) (Marshall, J., dissenting) (section 2254(d) "says nothing concerning when a district judge may hold an evidentiary hearing—as opposed to acting simply on the state court record . . . [T]he question whether such

a hearing is approriate on federal habeas corpus continues to be controlled exclusively by our decision in *Townsend v. Sain")*; *White v. Estelle*, 556 F.2d 1366, 1368 & n. 4 (5th Cir.1977); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1505 & n. 7 (2d ed. 1973) (section (d) "does not purport to define when a federal evidentiary hearing is mandatory; it appears merely to state a set of rather confused burden of proof rules to guide the district courts which are holding such hearings"). *But see United States v. Franzen*, 676 F.2d 261, 268 (7th Cir.1982) (Posner, J. concurring) (arguing that "*Townsend* was a product of its time," that "times have changed" and that it is "doubtful" that *Townsend* would be decided the same way today, but that section 2254(d) "unintentionally . . . froze the standard laid down in *Townsend v. Sain* against any change of mind (which was not then foreseen) by the Supreme Court, until such time as Congress itself should amend or repeal the statute"); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4265 (1978) (while observing that the statute "apparently assumes that the decision to hold an evidentiary hearing has been made," argues that the "best view" is that Congress merely codified *Townsend)*.

The end result of the burdens set up by Congress in the 1966 amendment may be summarized:

> When one or more of the eight statutory factors applies, the state's factual conclusions are no longer statutorily presumed correct; it does not follow that the state's conclusions, if such were made, are presumed to be incorrect and that the state has the burden of proving that petitioner is not unconstitutionally confined. Rather, any presumtpion of correctness

> simply drops out of the picture, and the traditional rules as to burden and standard of proof continue. For example, the petitioner must show by a preponderance of evidence that an unlawful search and seizure occurred. Once he makes a prima facie case for unlawfulness, the state in rebuttal may attempt to prove with a preponderance of evidence that the petitioner consented to the search. If unsuccessful, the state must prove beyond a reasonable doubt that the admission of the unlawfully seized evidence was harmless error.

Developments in the Law *supra* at 1142 (footnotes omitted). Further, the presumption of correctness can always be rebutted by "convincing evidence."

[2] Thus a federal habeas petitioner must make a showing of two elements in order to obtain an evidentiary hearing based on the fifth circumstance of *Townsend:* first, that a fact pertaining to his federal constitutional claim was not adequately developed at the state court hearing and that the fact was "material" (in the language of section (d)(3)) or "crucial to a fair, rounded development of the material facts" (in the language of *Townsend*);[11] second, that failure to develop that material fact at the state proceeding was not attributable to petitioner's inexcusable neglect or deliberate bypass. Either of these may itself require an evidentiary hearing. A demonstration of both elements entitles a petitioner to an

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11. This "materiality" requirement is not toothless. In *Folston v. Allsbrook,* 691 F.2d 184 (4th Cir.1982), the court stated: "The state court's finding of no discrimination is fully supported by the record. This would remain the case even if Folston had introduced evidence as to the percentage of women in the county; thus, the fact is not 'crucial to the adequate consideration of the constitutional claim,' as is required under the *Townsend* exception for material facts."

evidentiary hearing on the substance of his federal claim, the burdens of proof of which are allocated by section 2254(d). The state factfindings will receive presumptive correctness unless petitioner can make a prima facie showing that he comes within one of the eight listed categories. If the petitioner can make such a showing, then the presumption no longer applies and petitioner has the burden of proving, by a preponderance of the evidence, the facts supporting his substantive federal claim. Even if the presumption applies at the *Townsend* hearing on the merits of the federal claim, the petitioner must be granted an opportunity to rebut it by convincing evidence.

[3, 4] The above structure of analysis, when applied to the facts of the present case, yields the conclusion that a federal evidentiary hearing is required at least on the threshold issue of deliberate bypass/inexcusable neglect. The existing record demonstrates that Thomas has made a clear showing on the first of the *Townsend* elements, a fact pertaining to his constit·'ional claim was not adequately developed at the state court level. In an allegation of ineffective assistance of counsel, nothing could be more "indispensible to a fair, rounded development of the material facts," *Townsend v. Sain,* 372 U.S. at 321-22, 83 S.Ct. at 762, than counsel's testimony concerning her strategy at trial. In *Washington v. Strickland,* 693 F.2d 1243, 1254 (5th Cir.1982) (Unit B en banc), we noted the central role of counsel strategy in our assessment of effectiveness of representation: "When an attorney makes a strategic choice after satisfying [the] rigorous and extensive duty to investigate, courts will seldom if ever find that the choice was the result of ineffective assistance of counsel." Because often it will "not be clear

whether the failure to investigate a line of defense is based upon trial strategy or upon neglect of counsel's professional obligations," courts presume that counsel's actions are strategic. *Id.* at 1257. We noted that "this presumption can be rebutted, however, when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic." *Id.; see e.g., Kemp v. Leggett,* 635 F.2d 453, 454 (5th Cir.1981) (counsel by affidavit admitted that he was not competent to handle a murder case); *Nero v. Blackburn,* 597 F.2d 991, 994 n. 5 (5th Cir.1979) ("Nero's attorney stated that he was a civil attorney with very little criminal experience and at the time of trial he was not aware of Nero's right to a mistrial"); *Marzullo v. Maryland,* 561 F.2d 540, 547 (4th Cir.1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) ("at the post-conviction hearing. Marzullo's attorney made no claim that his decision not to challenge the jury was a trial tactic"). Further, a decision based on reasonable strategy would constitute deliberate bypass so as to negate the need for an evidentiary hearing under *Townsend. See Fay v. Noia,* 372 U.S. 391, 439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963), quoted at note 5 *supra;* Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Factfinding Responsibility, 74 Yale L.J. 895, 969 (1966) ("when a bypass ruling is possible, it will be necessary for the district court to determine whether the forfeiture imposed by the state courts followed from a tactical choice or other deliberate action"). An attorney's decisions on strategy at trial may bind his client even when such decisions are made without consultation. *See, e.g., Coco v. United States,* 569 F.2d at 371; *Aaron v. Capps,* 507 F.2d at 690-92.

Although the state habeas court concluded that trial counsel's failure to present any evidence during the penalty phase of the trial was "an apparent tactical decision", that determination was made in the absence of any direct evidence as to what trial counsel's strategy actually was and as to whether counsel's decision was reasonable.[12] Thomas' state habeas counsel challenged the effectiveness of his predecessor by producing character witnesses who stated that they could have testified at the penalty phase of the trial, but that trial counsel never contacted them.[13] Because trial counsel never contacted them, these witnesses could not and did not testify about trial counsel's strategy. In *Baldwin v. Blackburn*, 653 F.2d 942, 947 (5th Cir.1981), we noted that "this court has remanded for an evidentiary hearing when it could not conclusively determine from the record the accuracy of a petitioner's allegations of ineffective assistance." *Accord Guice v. Fortenberry*, 661 F.2d 496, 508 (5th Cir.1981) (en banc) ("The need for an evidentiary hearing becomes even more evident when we consider the limited evidence presented in state court . . . ."); *Clark v. Blackburn*, 619 F.2d 431, 434 (5th Cir.1980) ("The district court should hold a full hearing on any issues not resolved because of an insufficient record. Ultimately, the final determination of

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12. This places the case in marked contrast, in this regard, to cases such as *Mason v. Balkcom*, 531 F.2d 717, 722 n. 10 (5th Cir.1976) ("all the relevant witnesses testified extensively at the state hearing"); *West v. Louisiana*, 478 F.2d 1026, 1031 (5th Cir.1973) (same).

13. Four people testified on Thomas' behalf at the state hearing: his parents, an older brother and an older sister. The specific issue of trial counsel's strategy did not come up at the hearing.

whether or not counsel rendered reasonably effective assistance of counsel requires an inquiry into counsel's actual performance. That review must be based on an adequate record . . . .''); *Cannon v. Montanye,* 486 F.2d 263, 268 (2d Cir.1973), *cert. denied,* 416 U.S. 962, 94 S.Ct. 1982, 40 L.Ed.2d 313 (1974) (''the record on a significant factual question is sparse. Under these circumstances, we decline to decide the ultimate issue of taint''). In *McNair v. New Jersey,* 492 F.2d 1307, 1309 (3d Cir.1974), the third circuit expressed the vexing problem we face with Thomas' petition for habeas relief:

> When legal problems are presented which are not easily resolved even on the basis of clearly established facts, an evidentiary hearing is an *a fortiori* proposition if the state record is deficient in critical areas. There is no need here to make the task more difficult by struggling with a self-imposed blackout of relevant matters.

Now Thomas comes into federal court with yet new counsel and with a crucial piece of evidence not presented earlier at any hearing. The evidence which Thomas sought to present to the district Court bore directly on the issue of counsel's trial strategy. In fact, the affidavit of Thomas' trial attorney came very close to admitting that she had had no strategy at all for the penalty stage of Thomas' capital trial:

> There were two parts to Joseph Thomas' trial. During the guilt/innocence part of the trial, I put up evidence and tried the case on the issue of Joseph Thomas' innocence.
>
> I did not prepare for the penalty phase of the trial, nor did I investigate or interview witnesses for the penalty phase of Joseph Thomas' trial. I made

no preparation or presentation of any mitigation circumstances.

Thomas contends that the affidavit proves that his trial attorney's actions and inactions during the penalty phase were not based on tactical decisions but rather were the result of a complete failure to investigate or prepare. The affidavit is, at the very least, sufficient to meet the portion of the *Townsend* criteria requiring that the evidence sought to be presented in the federal evidentiary hearing be material to the disputed legal issue involved. We do not deem the affidavit conclusive on the strategy issue, although we doubt that the state habeas court would have decided the strategy question the same way had it had access to the affidavit.

Before Thomas is entitled to an evidentiary hearing on the merits of his ineffectiveness of trial counsel claim and the underlying factual issues of trial strategy, he must also show the district court, by evidence, that the second of the *Townsend* requirements is met in his case. He must demonstrate that the failure to present the testimony of trial counsel at the state habeas proceeding was not due to Thomas' inexcusable neglect or deliberate bypass.[14]

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14. Thomas contends that the pivotal testimony was not presented because his court appointed state habeas counsel was as ineffective as his earlier trial attorney. Thomas argues that the default by his habeas counsel cannot be attributed to him because he was indigent, incarcerated, wholly dependent on his court-appointed counsel. Thomas referred this court to an argument he made to the district court that the organization representing him at the state habeas proceeding lacked the resources to investigate and present his case effectively. Thomas was represented at the first state habeas proceeding by the Prisoner's Legal Counseling Project (PLCP),

(Continued on following page)

The present record contains no direct evidence of why trial counsel was not called to testify at the state habeas proceeding. The district court must hold an evidentiary hearing on whether failure to offer trial counsel's affidavit or testimony was due to the inexcusable neglect or deliberate bypass of Thomas. *See Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978) ("in most cases, a deliberate bypass must itself be proved by an evidentiary hearing, unless it is clearly on the record, as when the trial transcript reveals an express waiver of the issue by defense counsel"); *Coco v. United States*, 569 F.2d 367, 370 (5th Cir.1978) ("Normally, where serious and funda-

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a small organization based at the University of Georgia Law School. Thomas argues that PLCP is "ridiculously overburdened by a large caseload and voluminous requests for assistance by incarcerated persons in all the state penal institutions. All that PLCP can hope to do is present short petitions containing only the most obvious issues readily apparent from a cursory review of transcripts. They are not equipped to handle an in-depth review of the case nor are they trained in the complex issues involved in death penalty cases."

Thomas also asserted that representatives of the state of Georgia had been pressuring PLCP to cease representing capital prisoners. At the same time that he moved to admit his trial counsel's affidavit into evidence, Thomas moved to depose the director of PLCP, in addition to his trial counsel and his state habeas counsel. Finally, Thomas contends that he "could not even subpoena his trial counsel whose ineffectiveness was alleged." Ga.Code § 38-801(d) requires the tender of a witness fee of ten dollars and mileage fee of twenty cents per mile with the service of a subpoena for the attendance of a witness. Thomas asserts that he could not afford these fees and, consequently, that the only witnesses he could present at his state habeas corpus hearing were family members who appeared and testified voluntarily. The record does not reveal whether Thomas did in fact attempt to secure the testimony or affidavit of trial counsel for the state proceeding.

mental rights are involved and the section 2255 motion is denied on a deliberate bypass theory, the district court must base its decision on facts developed at an evidentiary hearing"); *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir.1981) ("Unless the record clearly establishes a deliberate bypass of the direct appeal, the issue requires an evidentiary hearing"); Developments in the Law, *supra* at 1130 ("In many cases [the] *Fay* [issue] will require its own evidentiary hearing").

The district court's disposition of the deliberate bypass/inexcusable neglect issue will determine whether there is a need for a further evidentiary hearing on the merits of Thomas' ineffectiveness of trial counsel claim. If the district court concludes initially that Thomas did not waive the right to present the evidence or that failure to present the evidence did not result from deliberate bypass or inexcusable neglect, then Thomas is entitled to a further evidentiary hearing on the merits of his trial counsel effectiveness claim. At that subsequent hearing Thomas comes under section 2254(d)(3), and the state factfinding on the strategy issue is not entitled to a presumption of correctness.[15] The affidavit of trial counsel

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15. We need not reach the issue governed by *Summer v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). *See also In re Wainwright*, 678 F.2d 951 (11th Cir.1982); *Germany v. Estelle*, 639 F.2d 1301 (5th Cir.), *cert. denied*, 454 U.S. 850, 102 S.Ct. 290, 70 L.Ed.2d 140 (1981). The *Mata* analysis is not triggered unless a habeas petitioner is unable to come within one of the first seven categories of 28 U.S.C. 2254(d). In *Mata*, itself, the factual record was complete, 449 U.S. at 549, 102 S.Ct. at 767, and it was "clear that the court [granting the writ] could not have been implicitly relied on paragraphs 1 through 7 of § 2254(d) in reaching the decision." *Id.* at 770. By contrast, Thomas contends that he comes within § 2254 (d)(3). *Accord Rivera v. Harris*, 643 F.2d 86, 97 n. 15 (2d Cir.), *reversed on other grounds*, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981).

more than meets the prima facie requirements of section (d): it is a "material" piece of evidence, if not *the* most material piece of evidence, on the crucial issue of trial strategy, and the evidence was not "adequately developed at the state court hearing." Since the statutory presumption is not operative, the standard of proof on the issue of ineffectiveness is preponderance of the evidence. *See Walker v. Johnston,* 312 U.S. 275, 286, 61 S.Ct. 574, 579, 85 L.Ed. 830 (1941) (habeas petitioner has the "burden of sustaining his allegations by a preponderance of the evidence"); *Johnson v. Zerbst,* 304 U.S. 458, 468-69, 58 S.Ct. 1019, 1024-25, 82 L.Ed. 1461 (1938) (prisoner seeking federal habeas must prove by preponderance of the evidence that he did not waive right to counsel); Developments in the Law, *supra* at 1140. The preponderance of the evidence standard would control at the hearing on effectiveness of trial counsel.

REVERSED and REMANDED.

FAY, Circuit Judge, specially concurring:

I concur in the result reached in Judge Vance's scholarly opinion based on the precedent of *Guice v. Fortenberry,* 661 F.2d 496 (5th Cir.1981) (en banc). However, I personally still adhere to the views expressed by Judge Reavley's dissenting opinion in *Guice.* Unfortunately we are trying to accommodate and reconcile conflicting authorities. It seems to me that the principles of comity and federalism are paramount and straightforward. Federal courts should not be required to hold hearings nor be asked to grant relief based upon evidentiary material which has never been presented to the state courts when the state courts afford procedures by which the evidence could have been considered.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OR GEORGIA
THOMASVILLE DIVISION

CIVIL ACTION NO. 80-65-THOM

JOSEPH THOMAS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

OPINION AND ORDER ON REMAND

(Filed September 14, 1984)

The Petitioner in this habeas corpus proceeding raised a number of issues, one of which was that he was not afforded the effective assistance of counsel at trial. The Court determined that the Petitioner was given a full annd fair opportunity to develop this issue in the state habeas corpus proceedings and that the state habeas corpus court had properly ruled adversely to the Petitioner's contention, and applying federal legal standards to the facts developed in the state habeas corpus court, this Court concluded that the issue was without merit and did not warrant an evidentiary hearing in this Court. On appeal the Court of Appeals determined that the Petitioner was entitled to an evidentiary hearing on the merits of his ineffectiveness of trial counsel claim if he could demonstrate that the failure of his habeas corpus counsel to present

the testimony of the Petitioner's trial counsel at the state habeas proceeding was not due to the Petitioner's inexcusable neglect or deliberate by-pass and remanded the case to this Court stating that "The district court's disposition of the deliberate by-pass/inexcusable neglect issue will determine whether there is a need for a further evidentiary hearing on the merits of Thomas' ineffectiveness of trial counsel claim." Accordingly, this Court conducted an evidentiary hearing on the threshold issue of inexcusable neglect and the determination made thereon is as is hereinafter indicated.

In the habeas corpus proceeding in the Superior Court of Butts County, Georgia the Petitioner was represented by James C. Bonner, Jr., and the issue of ineffective assistance of trial counsel was raised in the state petition for a writ of habeas corpus. Mr. Bonner, however, acting on behalf of the Petitioner, never talked with Petitioner's trial attorney, Ms. Mary Young, prior to the state habeas corpus hearing. He did contact several family members and friends of the Petitioner who were willing to come to the state habeas corpus hearing and who were willing to testify that they would have appeared on the Petitioner's behalf at the sentencing phase of his trial and Mr. Bonner challenged the effectiveness of counsel at the sentencing phase in the petition which he filed on behalf of Thomas.

Mr. Bonner testified that he had no recollection of considering the possibility of subpoenaing Ms. Young to appear at the state habeas corpus hearing and that he did not try to contact Ms. Young to determine if she would voluntarily appear. He said, "I can't give you any excuse

for that omission. But I'm sure I didn't." Mr. Bonner also stated that he does not recall having any discussion with his client about the possibility of having Ms. Young present at the state habeas corpus hearing. He also stated that Thomas was "extremely naive in the law" and "was probably extremely naive in most other ways." Mr. Bonner also stated with reference to Thomas, "But I don't think he would have been capable . . . of contributing to that kind of discussion."

Mr. Bonner also stated that he did not consider obtaining Ms. Young's testimony by way of affidavit or deposition, but rather thought that he might hear Ms. Young's testimony as the State's "contribution to the issue."

In summary, the facts as above recited establish that Mr. Bonner, acting as Petitioner's counsel at the time of his state habeas corpus hearing, did not subpoena Petitioner's trial attorney to appear at the hearing nor did he attempt to obtain her testimony by an alternative means even though ineffective assistance of counsel had been raised on Petitioner's behalf in his state habeas corpus petition. Further, he did not even contact Ms. Young at all prior to the state habeas corpus hearing, but appeared to believe that the state might call Ms. Young as a witness.

It is this Court's view that where a Petitioner is represented by counsel and has made a decision to rely on the expertise and competence of his attorney, his failure to participate in a decision with reference to the presentation of an issue can bar him from receiving an evidentiary hearing on the merits of this issue. The evidence before

the Court does not show any justifiable reason why Petitioner at the time of the state habeas corpus hearing in Butts County was unable to develop material facts with reference to the issue of ineffective assistance of trial counsel by securing the presence of Ms. Young or securing her testimony in an alternative way. Furthermore, the evidence does not establish that Mr. Bonner, an experienced attorney in prisoner and death penalty litigation, was unaware of the significance of the testimony of the trial attorney who has claimed to be ineffective. It is thus clear that the failure of Petitioner's state habeas corpus attorney to secure the testimony of Ms. Young was due to inexcusable neglect and it is the Court's view that under the circumstances developed in the evidentiary hearing before this Court the inexcusable neglect of Petitioner's state habeas attorney was attributable to the Petitioner because, as the United States Court of Appeals for the Fifth Circuit noted in *Williams v. Beto,* 354 F.2d 698, 705-706 (5th Cir.1975):

> "When one seeks the assistance of counsel, he thereby confesses his own inadequacy in the field and stipulates his willingness, like any other client . . . to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to depend."

Thomas was not capable of contributing in any meaningful way to a discussion of the tactical advantage or disadvantage of obtaining Ms. Young's testimony. So, when his attorney, Mr. Bonner, failed to call Ms. Young to testify at the state habeas corpus hearing or obtain her testimony by other means, his inexcusable neglect is attributable to the Petitioner so as to bar him from receiving

an evidentiary hearing on the merits of his ineffective assistance of counsel claim.

To allow the Petitioner in this case, who is admittedly unable to participate in a legal discussion of the type necessary to establish that he deliberately by-passed his right to raise this claim, to hide behind his attorney's inexcusable neglect would, in effect, eliminate the legal principle of inexcusable neglect for *all cases in which the Petitioner is represented by counsel.*

Consistent with the foregoing, the Court concludes that there was inexcusable neglect on the part of Petitioner's state habeas corpus attorney in failing to secure the testimony of Petitioner's trial attorney concerning the ineffective assistance of counsel claim and that this inexcusable neglect is attributable to the Petitioner so as to bar him from receiving an evidentiary hearing on the merits of the ineffective assistance claim at this time.

Having made the determination required by the remand order of the Court of Appeals, this Court now reaffirms its previous decision denying the habeas corpus relief sought.

IT IS SO ORDERED this 14th day of September, 1984.

/s/ J. Robert Elliott

UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-8807

JOSEPH THOMAS,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,
Georgia Diagnostic &
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(July 8, 1985)

Before RONEY, FAY AND JOHNSON, Circuit Judges.

RONEY, Circuit Judge:

Joseph Thomas was convicted of felony murder, kidnapping, and armed robbery in Georgia and sentenced to death. On direct appeal the Supreme Court of Georgia affirmed the felony murder and kidnapping convictions and sentences but vacated the conviction and sentence for

armed robbery on the ground that under state law a defendant may not be convicted and sentenced for both felony murder and the lesser included felony on which the felony murder conviction rests. *Thomas v. State,* 240 Ga. 393, 242 S.E.2d 1, 9 (1977), *cert. denied,* 436 U.S. 914 (1978). His federal habeas corpus petition is before this Court for the second time, another panel having previously remanded the case for a limited evidentiary hearing concerning a claim of ineffective assistance of counsel at sentencing. *Thomas v. Zant,* 697 F.2d 977 (11th Cir. 1983) (*Thomas I*). That hearing was ordered to enable the district court to determine whether Thomas' state habeas corpus counsel committed deliberate bypass or inexcusable neglect by failing to present, depose, or even contact Thomas' trial counsel in connection with the ineffective assistance of counsel claim raised in state habeas corpus proceedings. *Id.* at 986. On remand, the district court, after hearing testimony from Thomas' state habeas corpus counsel, determined that counsel's failure constituted inexcusable neglect and denied Thomas a full federal evidentiary hearing on the ineffective assistance claim. The case is on appeal from that judgment.

In the meantime, controlling decisions of the United States Supreme Court and this Court sitting *en banc* mandate the issuance of a writ of habeas corpus as to Thomas' conviction on his alternative claim of unconstitutional burden-shifting jury instructions. *Francis v. Franklin,* — U.S. —, — S.Ct. —, — L.Ed.2d — (1985) [No. 83-1590, slip op., April 29, 1985]; *Tucker v. Kemp,* — F.2d — (11th Cir. 1985) (*en banc*), [No. 83-8466, slip op. at 4531, 4535-36, May 31, 1985]; *Drake v. Kemp,* — F.2d — (11th Cir. 1985) (*en banc*) [No. 83-8047, slip op. at 4577, 4581-82, May 31,

1985]; *Davis v. Kemp*, 752 F.2d 1515, 1517-19 (11th Cir. 1985) (*en banc*), *cert. denied*, 37 Cr.L. 4077 (U.S. June 3, 1985).

The facts of this case are fully developed in the opinion of the Supreme Court of Gerogia, *Thomas v. State*, 242 S.E.2d at 3-4, and we discuss them below only to the limited extent necessary for resolution of the issue addressed. The full procedural history was set out in the prior panel opinion, *Thomas I*, 697 F.2d at 978-79. Because of its disposition of that appeal, the panel there declined to address other issues raised by Thomas, one of which was the claim upon which we now grant relief. 697 F.2d at 979.

Thomas was charged in a three-count indictment with felony murder, armed robbery, and kidnapping with bodily injury. In Georgia, felony murder requires a finding that the defendant killed the victim while intentionally committing another felony, or that a co-participant killed the victim while the defendant and the co-participant were intentionally committing another felony. *See* O.C.G.A. § 16-5-1(c); *Drake v. Kemp*, — F.2d at —, slip op. at 4584. Of course, where the felony murder defendant is sentenced to death, the evidence must also establish the defendant's involvement in the murder to the extent required by *Edmund v. Florida*, 458 U.S. 782, 801 (1982) (death penalty foreclosed because of "the absence of proof the [petitioner] killed or attempt to kill . . . or contemplated that life would be taken."). Intent is an essential element of the armed robbery charge underlying the felony murder conviction. O.C.G.A. § 16-8-41(a). At trial, the judge instructed the jury as follows:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act

> or [omission] to act, an intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be a product of the person's will, but that the presumption may be rebutted. A person of sound mind and discretion is presumed to* intent, but the [trier of] facts, and you are the trier of facts in this case, may find such intention upon con-
>
> A person will not be presumed to act with criminal intent, but the [trier of] facts, and you are the trier of facts in this case, may find such intention upon considering the words and conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. Every person is assumed to be of sound mind and discretion. But the presmuption may be rebutted. A specific intent to commit the crime charged in each of these indictments, in each count thereof, is an essential element that the State must prove beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. The intent may be shown in many ways, provided the jury find beyond a reasonable doubt that it existed from the evidence produced before you.

(emphasis added). The emphasized portion of the instruction is identical to the instructions found impermissible in the recent decisions cited above.

The State argues that any constitutional infirmity in the above instructions was cured by the general instructions that the defendant is presumed innocent and that the State bears the burden of proof to prove each element beyond a reasonable doubt. Such an argument is foreclosed by *Franklin v. Francis*, — U.S. at —, slip op. at 12. Neither is the defect corrected by the more specific instruction that "[a] person will not be presumed to act with criminal intent, but the [trier of] facts, and you are the

trier of facts in this case, may find such intention upon considering the words and conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted." *See Francis v. Franklin,* — U.S. at —, slip op. at 12-16; *Drake v. Kemp,* — F.2d at —, slip op. at 4582; *Tucker v. Kemp,* — F.2d at —, [No. 83-8466, slip op. at 4536]; *Davis v. Kemp,* 752 F.2d at 1517-19.

A review of the entire jury charge in light of *Francis v. Franklin* and this Court's *en banc* decisions compels the conclusion that Thomas' jury instruction violates *Sandstrom v. Montana,* 442 U.S. 510 (1979).

In such a case in this Circuit, a denial of habeas corpus relief would be in order if the constitutional error were harmless. The Supreme Court has expressly declined to resolve whether a *Sandstrom* violation can ever be harmless. *Francis v. Franklin,* — U.S. at —, slip op. at 17; *see Kemp v. Davis,* 37 Cr.L. 4078, 4079 (1985) White J., dissenting from denial of certiorari) (notiing that "[t]his is the fourth time that the Court has been presented with the opportunity to decide whether *Sandstrom* error may be harmless under any circumstances" and advocating granting of certiorari because "resolution of this important and frequently recurring question is long overdue"). In five recent cases, however, this Court sitting *en banc* has held that otherwise unconstitutional bruden-shifting jury instructions can be held harmless. *Brooks v. Kemp,* — F.2d —, — (11th Cir. 1985) (*en banc*) [No. 83-8028, slip op. at 4453, 4460-65, May 31, 1985]; *Tucker v. Kemp,* — F.2d at —, [No. 83-8466, slip op. at 4536-38]; *Drake v. Kemp,* — F.2d at --, —, slip op. at 4582-86; *McClesky v. Kemp,* 753 F.2d 877, 902-04 (11th Cir. 1985) (*en banc*); *Davis,* 752 F.2d at 1520-21. Under the approach set forth in *Davis*

and followed in subsequent cases, harmless error analysis is appropriate for *Sandstrom* violations (1) where the evidence of the defendant's guilt, including intent, was overwhelming; and (2) where the required intent was not made an issue of controversy at trial. *Davis*, 752 F.2d at 1521 (citing *Lamb v. Jernigan*, 683 F.2d 1332, 1342 (11th Cir. 1982), *cert. denied*, 460 U.S. 1024 (1983)).

In this case intent was made an issue for the jury to decide. This was a brutal murder. The victim was savagely beaten with a hammer and a shovel, shot in the face, and buried alive in a shallow grave in which he finally suffocated on dirt and his own blood and vomit. Four anonymous phone calls made to police described the location of the victim's car and gave misinformation about the victim. One of those calls was traced to Thomas' house. Thomas was arrested two days after the murder. He subsequently gave a detailed statement confessing his involvement in the crime. The statement was introduced at his trial.

Thomas' counsel argued at trial, however, that Thomas could not have had the requisite criminal intent. Thomas took the stand in his own defense and testified that he had no memory of the incident, the telephone calls to the police, or his confession. He attributed his lack of memory to pills he received from someone in Albany and ingested the day before the murder. Thomas' counsel elicited testimony from the State's examining psychiatrist that it would be possible for a drug to "overmaster [a] person's will or impel him to commit a crime," and she emphasized that testimony in her closing argument. Finally, she requested and obtained a jury charge on drug intoxication, and the court's instructions included the following:

> However, if [because] of drunkeness or intoxication of one's mind shall become so impaired as to render him incapable of forming an intent to do the act charged or to understand that certain consequences were likely to result from it, he would not be criminally responsible for the act. Whether that was true or not, it is a question for you and the jury to determine.

Thus the issue of intent was squarely presented to the jury with some evidence to support the defendant's argument. In such a case, the instruction held to be unconstitutional because it shifts the burden on the intent issue to defendant cannot be said to have been harmless.

Unlike the petitioners in *Tucker*, *Davis*, and *McCleskey*, Thomas did not claim nonparticipation in the killing. *See Tucker*, — F.2d at —, [No. 83-8466, slip op. at 4536] (*Sandstrom* error on intent instruction harmless where "sole defense was nonparticipation in the killing"); *McCleskey*, 753 F.2d at 903-04 (*Sandstrom* error on intent instruction harmless where alibi defense asserted); *Davis*, 752 F.2d at 1521 (*Sandstrom* error harmless where "[t]he defense presented by Davis was nonparticipation"). Rather, the defense introduced evidence that, if believed, tended to negate intent. *See Brooks*, — F.2d at —, slip op. at 4462-65 (*Sandstrom* error on intent instruction not harmless where defense was accident); *Franklin v. Francis*, 720 F.2d 1206, 1212 (11th Cir. 1983); (*Sandstrom* error not harmless where defendant testified gun went off accidentally when victim slammed door in his face), *aff'd*, — U.S. —, —, — S.Ct. —, —, — L.Ed.2d —, — (1985) [No. 83-1590, slip op. at 17-18, April 29, 1985]. We do not intend to imply that a failure to present evidence or to make arguments regarding lack of intent, in the absence of overwhelming evidence of intent, is enough to take intent out of issue. *See McCleskey*, 753 F.2d at 904.

In light of this decision, we need not reach other issues raised by Thomas. The district court's denial of habeas corpus relief on the *Sandstrom* issue is REVERSED, and the case REMANDED to the district court with instructions to grant a writ of habeas corpus, conditioned upon the State's affording Thomas a new trial.

REVERSED and REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS
Eleventh Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Title	*Docket Number*	*Date of Denial*	*Citation of Panel Decision*
Thomas v. Kemp	84-8807	9/12/85	M.D.Ga.,766 F.2d 452